

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Empowering Consumers to Prevent and Detect	)	CG Docket No. 11-116
Billing for Unauthorized Charges (“Cramming”)	)	
	)	
Consumer Information and Disclosure	)	CG Docket No. 09-158
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

**COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®**

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**COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®**

**I. INTRODUCTION AND SUMMARY**

CTIA – The Wireless Association® (“CTIA”)<sup>1</sup> respectfully submits these comments in response to the Notice of Proposed Rulemaking (“*NPRM*”) released by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.<sup>2</sup> The Commission should not adopt any new cramming mandates for wireless services. There is no persuasive evidence that cramming is a widespread problem in the wireless industry, and multiple studies have established that wireless consumers remain satisfied with their wireless service. Wireless carriers know that consumers do not like surprises on their bills, and they are committed to preventing billing issues before they arise and resolving those issues when they do occur. The Commission’s own stated numbers – which have not been fully released – reflect this

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<sup>1</sup> CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

<sup>2</sup> *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”)*, Notice of Proposed Rulemaking, 26 FCC Rcd 10021 (2011) (“*NPRM*”).

commitment by indicating a 0.00016 percent cramming complaint percentage, or one cramming complaint per 646,974 wireless subscriber devices.

The extraordinarily small number of wireless cramming complaints is simply dwarfed by the extraordinarily large number of wireless Telephone Consumer Protection Act (“TCPA”)<sup>3</sup> complaints. And the number of wireless-related TCPA complaints continues to grow. Rather than expending resources on wireless cramming, the Commission should take steps to address the mountain of wireless TCPA complaints, as outlined below.

Carriers already have strong competitive incentives to ensure that cramming does not occur and compete vigorously on the basis of their customer service offerings and billing policies, eliminating the need for prescriptive regulations. In addition to being unnecessary, such requirements could increase customer confusion and frustration, complicating customer service issues. New cramming requirements also could have severe unintended consequences, such as stifling the thriving app ecosystem, limiting the service choices and purchasing features that consumers have told carriers they prefer, and potentially limiting consumers’ access to the third-party applications. New cramming rules also would be inconsistent with President Obama’s recent Executive Order calling on federal agencies to “reassess and streamline regulations.”

Rather than adopt new rules that will inevitably reduce the flexibility of wireless carriers to address billing issues, the Commission should continue to support voluntary industry practices directed toward any cramming concerns – including cramming by third parties. The Commission also should work with carriers to help consumers become better aware of the myriad tools available to monitor and manage their accounts.

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<sup>3</sup> 47 U.S.C. § 227.

Finally, the Commission lacks authority to adopt the proposed rules. The Communications Act prohibits the Commission from adopting cramming requirements related to short message service (“SMS”) and wireless broadband data services or bills for such services. In addition, the cramming proposals would violate the First Amendment because they are unduly burdensome and are not justified by the record in this proceeding – regardless of whether they apply to voice, SMS, or data services.

## **II. THERE IS NO EVIDENCE THAT CRAMMING IS A WIDESPREAD PROBLEM IN THE WIRELESS INDUSTRY.**

### **A. No compelling record has been established to indicate a cramming problem for wireless customers.**

The Commission proposes that all CMRS providers include on their bills and websites the Commission’s contact information for complaint submission and seeks comment on blocking all third-party charges and extending additional cramming requirements to wireless services.<sup>4</sup> Such inquiries and proposed mandates, however, are unnecessary, unwarranted, and without foundation because no significant cramming problem exists for wireless customers. For example, even though the Commission states in the *NPRM* that approximately 16 percent of the cramming complaints it received from 2008-2010 relate to wireless services,<sup>5</sup> the Commission’s 34 most recent quarterly reports on consumer complaints make no mention of wireless cramming issues in their analysis of “top consumer issues” for complaints. Thus, not since 2002 has wireless cramming appeared as a top complaint issue in an FCC Quarterly Report. This underscores the fact that wireless service providers already take extensive measures to protect

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<sup>4</sup> See *NPRM* ¶¶ 3-4.

<sup>5</sup> *Id.* ¶ 4 n.11.

consumers from abusive cramming practices.<sup>6</sup> Wireless carriers know that consumers do not like surprises on their bills, and they are committed to preventing billing issues before they arise and resolving those issues when they do occur.

The Commission also has failed to release publicly the wireless cramming complaint “evidence” and data on which it relies, preventing parties from participating in a “data-driven” proceeding. By not releasing the data, the Commission raises questions about whether the data reflects accurately the extent and magnitude of wireless consumers’ experience with cramming, opens the door for parties to mischaracterize data, and distorts the true level of consumer satisfaction with wireless services. For example, CTIA and other participants in this proceeding cannot effectively analyze the validity of the complaints or whether wireless providers resolved the issues to the consumers’ satisfaction. The ability to review the underlying data at a granular level is extremely important not only to make sure that the Commission is basing its decision on a robust and factually correct record, but also because the Commission is considering imposing cramming rules that ultimately could impose significant implementation costs and challenges on wireless providers, cause consumer confusion, and hinder voluntary industry billing initiatives.

Even assuming, *arguendo*, the accuracy of the Commission’s data that approximately 16 percent of the cramming complaints it received from 2008 through 2010 relate to wireless services (compared to the 82 percent that are wireline related),<sup>7</sup> this equates only to 419 complaints per year on average. During this same three-year period, there were approximately

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<sup>6</sup> See generally FCC Quarterly Reports on Informal Consumer Inquiries and Complaints, <http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-and-complaints> (last accessed Oct. 20, 2011) (“FCC Quarterly Reports”).

<sup>7</sup> See *id.* ¶ 4, n.11 (citing FCC Quarterly Reports on Informal Consumer Inquiries and Complaints).

272 million active U.S. wireless subscribers,<sup>8</sup> which means that there was a 0.00016 percent cramming complaint percentage, or a ratio of one complaint per 646,974 wireless subscriber units per year. In addition, the wireless industry issued billions of monthly bills to service those 272 million active subscribers, reducing the effective cramming complaint percentage further and demonstrating that this “problem” certainly does not rise to a level requiring government mandated protections. It also indicates that any ban or restriction on third-party billing would be completely unwarranted and contrary to the public interest. As discussed below, such action could derail the tremendous success of the booming app ecosystem.

The *NPRM* again overstates the wireless cramming problem when citing Federal Trade Commission (“FTC”) complaint data from 2010.<sup>9</sup> Although ten percent of the complaints the FTC received about “unauthorized charges or debits” in 2010 concerned wireless phone bills (775 wireless complaints versus 6,882 wireline complaints),<sup>10</sup> those wireless complaints represent one complaint per 372,342 consumers, or 0.00027 percent. Also, the FTC recorded *only four* such wireless complaints in 2009, compared to 8,040 wireline complaints.<sup>11</sup> In 2008, the FTC received no mobile complaints and 6,279 wireline complaints.<sup>12</sup> Thus, only 3.5 percent of all FTC unauthorized charge complaints between 2008 and 2010 concerned wireless cramming.

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<sup>8</sup> *Semi-Annual 2011 Top-Line Survey Results*, available at [http://files.ctia.org/pdf/CTIA\\_Survey\\_MY\\_2011\\_Graphics.pdf](http://files.ctia.org/pdf/CTIA_Survey_MY_2011_Graphics.pdf).

<sup>9</sup> *NRPM* ¶ 4, n.11 (citations omitted).

<sup>10</sup> *Consumer Sentinel Network Data Book for January-December 2010*, Federal Trade Commission, Appendix B3, at 80 (Mar. 2011), available at <http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2010.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

Unfortunately, the *NPRM* also proves to be replete with flawed data. For example, the Commission cites to a letter sent by the California Public Utilities Commission (“CPUC”) stating that wireless providers and third-party billing aggregators issued 724,491 refunds to California consumers totaling \$7,148,692.<sup>13</sup> However, the *NPRM* fails to mention that the CPUC only received 22 wireless cramming complaints total during that time, an exceedingly small number.<sup>14</sup> The *NPRM* also neglects to report that these refunds are an imperfect proxy for consumer complaints regarding cramming – the CPUC explicitly states that those 724,492 refunds “may include refunds issued for matters other than cramming.”<sup>15</sup>

As discussed above, the record fails to show that a wireless cramming problem exists. Rather, the *NPRM* relies on incomplete, mischaracterized, and flawed data. On top of that, the bill credits and refunds provided by wireless carriers as part of their efforts to address billing issues undermine the Commission’s speculation in the *NPRM* that cramming is being underreported and suggest further that the Commission’s concern is overstated.<sup>16</sup> Therefore, the Commission should refrain from imposing new mandates related to unauthorized billing for wireless services.

**B. Studies confirm that consumers are satisfied with their wireless service.**

Multiple studies have established that wireless consumers are satisfied with their wireless service, and when consumers have concerns with their wireless service, wireless providers act quickly to resolve them. For instance, the American Consumer Satisfaction Index (“ACSI”)

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<sup>13</sup> See *NPRM* ¶ 13, n.62 (citations omitted).

<sup>14</sup> See Letter from Jeannette Lo, Program Manager, Utilities Enforcement Branch, California Public Utilities Commission, to Stephen Klitzman, Deputy Chief, Office of Intergovernmental Affairs, Consumer & Governmental Affairs Bureau, FCC, CG Docket No. 09-158 (June 8, 2011).

<sup>15</sup> See *id.*

<sup>16</sup> See *NPRM* ¶¶ 2, 19.

found in May 2011 that consumer satisfaction with the wireless telephone industry remained near its all-time high.<sup>17</sup> In addition, Volumes 1 and 2 of the 2011 Wireless Customer Care Studies by J.D. Power and Associates (“J.D. Power”) revealed consumer satisfaction scores were consistent with 2010 scores.<sup>18</sup> And the McLaughlin and Associates / Penn Schoen Berland Associates’ Annual National Wireless Consumer Issues Survey for MyWireless.org®, conducted March 1-3, 2011, “shows that America’s cell phone consumers remain highly satisfied with their wireless service . . . and believe proposals to add new regulations on their wireless service would raise prices and slow investment and innovation.”<sup>19</sup> It found that 95 percent of wireless customers were satisfied with their service. The data continues to indicate that wireless consumers are highly satisfied with their service, and wireless providers are constantly striving to improve their responsiveness and effectiveness on customer care issues.

### **III. INSTEAD OF EXPENDING RESOURCES ON WIRELESS CRAMMING, THE COMMISSION SHOULD ADDRESS THE ASTOUNDING NUMBER OF WIRELESS TCPA COMPLAINTS.**

The extraordinarily small number of wireless cramming complaints is simply dwarfed by the extraordinary number of wireless TCPA complaints. While wireless providers take

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<sup>17</sup> *ACSI Commentary May 2011*, American Customer Satisfaction Index (May 17, 2011), [http://www.theacsi.org/index.php?option=com\\_content&view=article&id=247&Itemid=273](http://www.theacsi.org/index.php?option=com_content&view=article&id=247&Itemid=273) (last accessed Oct. 20, 2011).

<sup>18</sup> See *2011 Wireless Customer Care Performance Studies – Volume 1*, J.D. Power and Associates (Feb. 3, 2011), <http://www.jdpower.com/news/pressrelease.aspx?ID=2011010> (last accessed Oct. 20, 2011) (reporting that the customer care performance score for wireless providers equaled 739 out of 1,000 for the industry average); *2011 Wireless Customer Care Performance Studies – Volume 2*, J.D. Power and Associates (July 28, 2011), <http://www.jdpower.com/news/pressrelease.aspx?ID=2011112> (last accessed Oct. 20, 2011) (reporting that the customer care performance score for wireless providers equaled 762 out of 1,000 for full-service customers and 709 out of 1,000 for non-contract customers). Consumers gave the customer care performance of their wireless providers a score of 748 out of 1,000 in 2010. See *2010 Wireless Customer Care*, J.D. Power and Associates, <http://www.jdpower.com/telecom/articles/2010-Wireless-Customer-Care-Volume-1/> (last accessed Oct. 20, 2011).

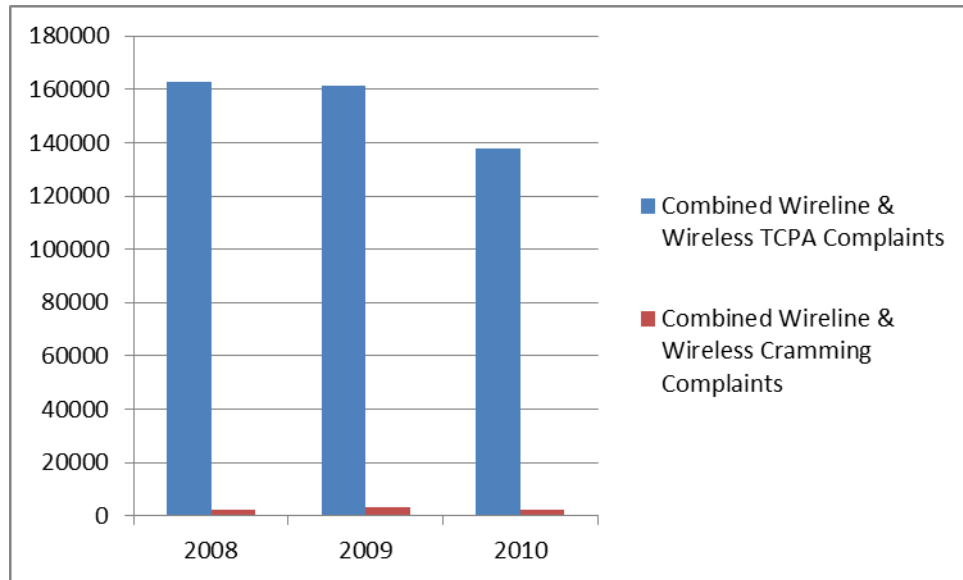
<sup>19</sup> *Wireless Consumers Remain Overwhelmingly Satisfied with Service*, MyWireless.org® (Mar. 22, 2011), <http://mywireless.org/wireless-consumers-remain-satisfied/> (last accessed Oct. 20, 2011).

significant actions to block hundreds of millions of unsolicited telemarketing calls (including live, autodialed, and artificial or prerecorded telemarketing calls), text message advertisements, and unsolicited commercial e-mail messages<sup>20</sup> to mobile devices each month, the number of consumer complaints associated with these activities continues to increase dramatically. These unwanted, illegal calls and messages by third parties victimize wireless customers, who in turn complain to their providers and to the Commission. Rather than expending resources on wireless cramming, the Commission should take steps to address the mountain of wireless TCPA complaints, and related CAN-SPAM violations, as outlined below. In this area, the Commission has actual, consistent, and troubling data in its record.

A detailed analysis of the Commission's Quarterly Reports on Informal Consumer Inquiries and Complaints reveals the severity of the third-party telemarketing problem, and a full summary of TCPA complaint data since 2002 (derived from the Quarterly Reports) is included at Attachment A. For example, the Commission received 462,398 TCPA-related complaints during 2008-2010, completely dwarfing the FCC's claim of 7,854 cramming-related complaints in that period.

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<sup>20</sup> The Commission has promulgated CAN-SPAM rules to protect consumers from "unwanted mobile service commercial messages." 47 C.F.R. § 64.3100. The CAN-SPAM Act defines "mobile service commercial message" as a "commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service . . . in connection with such service." See CAN-SPAM Act, Section 14(d), *codified at* 15 U.S.C. § 7712(d).



Of those TCPA complaints, 142,477 were wireless-related. This figure compares to 1,257 claimed wireless cramming complaints. And the number of wireless-related TCPA complaints continues to grow, with 72,334 complaints received in 2010. According to the Commission’s own Quarterly Reports, almost 75% of all of the wireless complaints involving “top consumer issues” in 2010 were TCPA-related, while cramming did not even appear on the list. When wireline data is incorporated, approximately 80% of all complaints involving “top consumer issues” in 2010 were TCPA-related.

As the complaints logged by the Commission’s Consumer & Governmental Affairs Bureau make clear, this pervasive, unlawful third-party conduct is disruptive to consumers’ wireless experiences and has been continuing for years. The TCPA and CAN-SPAM violations discussed above impose significant costs on consumers and carriers and divert industry resources away from developing innovative new services. The sheer volume of complaints also increases the administrative burden on Commission staff. As stated above, these are actual, consistent (and growing), and troubling numbers.

When faced with civil actions by carriers, the TCPA violators often disappear and then reappear under a new name. Therefore, more aggressive investigation and prosecution of these complaints by the Commission is needed to deter the growth of this fraudulent and oppressive third-party conduct. Otherwise, those who are guilty of breaking the law will be emboldened by the knowledge that they can evade carriers by adopting a simple company name change, with no fear of meaningful Commission enforcement under Section 503 of the Communications Act.<sup>21</sup>

**IV. THE COMPETITIVE WIRELESS INDUSTRY IS COMMITTED TO WORKING WITH THE COMMISSION AND CONSUMERS TO ADDRESS ANY CRAMMING CONCERNS, AND NO NEW MANDATES ARE NECESSARY AT THIS TIME.**

In the *NPRM*, the Commission seeks comment on whether its “proposed rules for wireline carriers or other requirements . . . should also be applied to CMRS carriers, [and] whether they are inapplicable or unnecessary in the CMRS context.”<sup>22</sup> As described below, the Commission’s proposed cramming rules are unnecessary in the wireless context because the wireless industry is intensely competitive on customer service issues, including billing policies, giving wireless carriers strong incentives to ensure that cramming does not occur. The numbers reflect this. Moreover, the Commission’s proposed rules may have unintended, deleterious consequences in the wireless context, such as stifling the vibrant applications segment of the wireless ecosystem and limiting consumer choice.

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<sup>21</sup> The Commission should also reaffirm the existing exception from its TCPA restrictions that allows wireless carriers to provide free-to-the-end-user autodialed calls, prerecorded messages and text messages (e.g., usage alerts and billing information) to their customers without the need for additional consent. *See* Comments of CTIA – The Wireless Association®, CG Docket No. 02-278 (filed June 21, 2010); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 45 (1992) (finding that Congress did not intend for the TCPA to prohibit free-to-the-end-user autodialed or prerecorded calls or messages from wireless carriers to their subscribers).

<sup>22</sup> *NPRM* ¶ 53.

**A. Wireless Carriers Compete Vigorously on the Basis of Their Customer Service Offerings and Billing Policies, Eliminating the Need for Prescriptive Regulations.**

Wireless carriers compete with one another on all service aspects, including on their customer service offerings and their billing policies. Competition in the wireless industry is driven by the constantly evolving capabilities of innovative wireless technologies and service offerings, which in turn influence consumer demand for services and related expectations regarding billing transparency and disclosure. Competition is also spurred by financial markets and investors, who scrutinize wireless carriers' customer acquisition and churn rates to assess their performance and investment potential. Wireless carriers thus face pressure from all sides of the marketplace to win and keep customers, and therefore are responsive to their customers' needs, including with respect to cramming and other billing issues. This intense competition eliminates the need for prescriptive cramming regulations.

In recent years, wireless carriers have responded to consumer demand and moved away from "walled garden" approaches towards making applications ("apps") and other content available on a variety of platforms and operating systems. Today, carriers compete vigorously to provide consumers with the broadest access to such features. As a result, a vibrant app ecosystem has blossomed, which Chairman Genachowski has recognized as "one of the most remarkable forces for economic opportunity and quality of life that we've ever seen."<sup>23</sup> New cramming rules could jeopardize the thriving app ecosystem and diminish or restrict the service choices and purchasing features that consumers have told carriers they prefer. Rather than protect consumers, new cramming rules applicable only to carrier billing would have the

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<sup>23</sup> Remarks of Chairman Genachowski at CTIA Wireless 2011 at 4 (Mar. 22, 2011).

unintended effect of moving the marketplace towards more “in-app” billing where charges for premium content are subject to less consumer protection and oversight than carrier billing.

Wireless carriers have strong incentives to demonstrate to their customers that they will not be subject to cramming, and to market themselves aggressively based on their success in this area. According to a J.D. Power study of wireless customer care, “[w]ireless customers who indicate that they have had a positive customer care experience are more loyal and are, therefore, less likely to switch carriers in the future, on average.”<sup>24</sup> A wireless carrier that fails to address its customers’ concerns related to cramming runs a high risk of losing its customers to a competitor. Moreover, consumer calls to a carrier’s customer care representatives incur great costs on carriers, potentially eclipsing the revenues they receive for billing and collection service. That’s why carriers closely monitor calls they receive complaining about “cramming” and other consumer complaints, and quickly discontinue billing for any party that generates too many complaints.<sup>25</sup> As a result, wireless carriers have strong incentives to ensure their

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<sup>24</sup> See J.D. Power and Associates, *J.D. Power and Associates Reports: Interaction with Agents May Significantly Elevate Satisfaction with the Wireless Customer Care Experience*, Press Release (Feb. 3, 2011), available at <http://www.jdpower.com/news/pressrelease.aspx?ID=2011010> (last accessed Oct. 20, 2011).

<sup>25</sup> See Transcript of FTC “Examining Phone Bill Cramming” Workshop, Comments by Michael Altschul, Senior Vice President and General Counsel, CTIA-The Wireless Association®, 127 (May 11, 2011) (“FTC Workshop Transcript”) (stating that calls to a customer care representative cost carriers an estimated \$7 to \$10 per call, much higher than the revenues from premium content, “so a few calls to customer care can erase any incentive to carry premium messages very quickly”), *id.* (stating that carriers “monitor on a daily basis all of their calls to their customer care and customer service representatives . . . so they can quickly detect any spikes in any particular issue that is causing customers to call customer care”), 128 (discussing carrier actions to suspend or not carry “programs that result in either too many complaints on a carrier’s network or . . . are not found to be compliant with the industry best practices”); see also FTC Workshop Transcript, Comments by Glen Reynolds, Vice President of Policy, U.S. Telecom, at 123-34 (discussing the importance of continuously monitoring cramming complaints “to identify potential problems that require implementation and remediation of the billing aggregators” and stating that companies have “exercised their authority to terminate or suspend either multiple service providers or even aggregators”).

customers are not “crammed” and, if they are or think they may be, to resolve their customers’ concerns effectively.

**B. Industry Initiatives Effectively Address Consumer Billing Concerns.**

Several comprehensive industry initiatives effectively address consumers’ billing concerns. The Commission should favor such flexible, ongoing industry initiatives because these efforts are capable of keeping pace with the rapid innovation in the wireless industry and can be modified to address evolving consumer issues in a timely manner.

*CTIA Consumer Code for Wireless Service.* CTIA’s Consumer Code for Wireless Service (“Consumer Code”) addresses consumer concerns related to selecting and managing their wireless service.<sup>26</sup> The Consumer Code currently includes commitments by wireless providers to disclose rates, taxes, fees, surcharges and terms of service in their billing materials; provide coverage maps; ensure readily accessible customer service; permit trial periods for new service; and provide usage notifications. Many wireless carriers (including all major carriers) have voluntarily signed on to the Consumer Code, demonstrating an industry-wide commitment to addressing consumer concerns.

The Consumer Code is an evolving document. CTIA first developed the Consumer Code in 2003 and periodically reviews it to ensure that it meets consumers’ needs and expectations and reflects industry innovations. In fact, CTIA recently updated the Code to include new wireless consumer usage notification guidelines, including commitments by wireless carriers to provide voice or text alerts that notify customers when they approach and reach monthly plan limits, provide alerts to notify customers when they are about to incur international roaming charges, and to disclose any tools that allow customers to set their own usage limits and to monitor their

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<sup>26</sup> *Consumer Code*, CTIA, <http://www.ctia.org/content/index.cfm/AID/10352> (“*Consumer Code*”) (last accessed Oct. 20, 2011).

usage balances.<sup>27</sup> This update was the product of a cooperative effort between CTIA, the Commission, and Consumers Union, and was hailed by Chairman Genachowski as “a big win for consumers.”<sup>28</sup>

*Wireless Consumer Checklist Initiative.* CTIA recently developed a Wireless Consumer Checklist (“Consumer Checklist”) to help wireless consumers choose the right service plans and devices, and to understand the applicable terms and conditions of service.<sup>29</sup> As the Commission noted in the *NPRM*, the Consumer Checklist “address[es] a variety of issues related to informed consumer choice and use of wireless service,” including “three questions in the FAQ that consumers can ask on how they can block third-party charges from their bills.”<sup>30</sup> While the Commission expresses concern that the Consumer Checklist “does not appear to address the specific practices that are the subject of the rules proposed above,”<sup>31</sup> the Consumer Checklist – like the Consumer Code – is an evolving document that is designed to help consumers keep up with the “wide variety of options” provided by “wireless carriers [who] are constantly innovating to win and keep customers.”<sup>32</sup>

*Mobile Marketing Association Guidelines.* In the *NPRM*, the Commission notes that the Mobile Marketing Association (“MMA”) has released its U.S. Consumer Best Practices guidelines (“BP Guidelines”), which “establish procedures for acquiring consent to be charged for additional services – including through ‘opt-in’ or ‘double opt-in’ mechanisms – in the

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<sup>27</sup> *See Consumer Code.*

<sup>28</sup> Remarks of Chairman Genachowski at The Brookings Institution at 2 (Oct. 17, 2011).

<sup>29</sup> CTIA, *CTIA-The Wireless Association® Announces “Wireless Consumer Checklist” Initiative*, Press Release (Apr. 5, 2011), available at <http://www.ctia.org/media/press/body.cfm/prid/2067> (“*Consumer Checklist Press Release*”).

<sup>30</sup> *NPRM* ¶ 54.

<sup>31</sup> *Id.*

<sup>32</sup> *Consumer Checklist Press Release.*

context of short codes for text messaging.”<sup>33</sup> MMA’s BP Guidelines are focused on “consumer protection and privacy” and seek to bring “together numerous stakeholders in the mobile ecosystem in an ongoing effort to improve the mobile subscriber experience in North America.”<sup>34</sup> Similar to the Consumer Code and the Consumer Checklist, the BP Guidelines offer a more flexible approach than Commission rules to alleviating any cramming problems that wireless consumers may experience.<sup>35</sup>

*Individual Carrier Initiatives.* As the Commission noted in the *NPRM*, individual carriers, including Sprint Nextel, Verizon, and U.S. Cellular, also “have practices that are consistent with some of the rules proposed [in the *NPRM*] – for example, offering consumers, without additional charge, blocking of third-party charges.”<sup>36</sup> Carriers also have practices that go beyond the rules proposed in the *NPRM*, demonstrating wireless carriers’ strong interest in addressing cramming issues. As one example, carriers enter into contracts with aggregators and their customers for billing and collection services associated with premium content. And carriers have increasingly adopted a model that rewards those marketers that have a low rate of customer complaints. If a marketer is not generating complaints to customer care, it will receive a larger revenue share from the carrier than those services that generate more complaints.<sup>37</sup>

As another example, Sprint Nextel has created a system of financial rewards and penalties through its contracts with messaging aggregators that incentivizes aggregators to work

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<sup>33</sup> *NPRM* ¶ 54.

<sup>34</sup> Mobile Marketing Association, *U.S. Consumer Best Practices*, Version 6.1, at 6 (Apr. 1, 2011), available at <http://www.mmaglobal.com/bestpractices.pdf>.

<sup>35</sup> See *id.* at 7 (noting that “each year, the MMA holds an industry forum to solicit feedback” on the BP Guidelines).

<sup>36</sup> *NPRM* ¶ 54.

<sup>37</sup> See Transcript of FTC “Examining Phone Bill Cramming” Workshop (May 11, 2011) (comments by Michael Altschul, Senior Vice President and General Counsel, CTIA-The Wireless Association®).

only with reputable content providers. Sprint Nextel's approach rewards aggregators who work with content providers that demonstrate compliance with the BP Guidelines and Sprint Nextel's internal guidelines, and penalizes aggregators that work with content providers who commit multiple infractions. Sprint Nextel's approach also penalizes aggregators for failing to identify or report billing incidents requiring refunds, and monitors aggregators' and content providers' track records so it can take appropriate remedial action where necessary.

The Commission should continue to favor flexible, evolving industry initiatives such as the Consumer Code, Consumer Checklist, BP Guidelines, and individual carrier's initiatives for addressing consumer cramming concerns, rather than prescriptive and inflexible regulations.

**V. INSTEAD OF IMPOSING NEW WIRELESS CRAMMING MANDATES, THE COMMISSION SHOULD SUPPORT VOLUNTARY INDUSTRY EFFORTS TO PREVENT CRAMMING ACTIVITY.**

In addition to seeking comment on new proposed cramming requirements, the Commission also asks "whether current industry practices or voluntary industry guidelines can address any cramming issues successfully, and, if not, what additions or modifications could make them an effective alternative to expanded Commission regulation."<sup>38</sup> As discussed above, cramming is not a widespread problem in the competitive wireless industry. Thus, instead of searching for potential regulatory mandates, the Commission should focus on ways it can assist wireless carriers in their efforts to prevent any cramming activity and educate consumers.

Specifically, the Commission should not adopt any new cramming complaint disclosure requirements on wireless providers or extend its other cramming proposals to wireless services. In addition to being unnecessary, such requirements are inconsistent with President Obama's

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<sup>38</sup> *NPRM* ¶ 39.

recent Executive Order calling on federal agencies to “reassess and streamline regulations.”<sup>39</sup> In addition, cramming rules could increase customer confusion and frustration, complicating customer service issues. Importantly, carriers are in the best position to be the “first stop” for resolving billing and other customer service issues, and they are committed to learning about and addressing evolving consumer concerns. Requiring service providers to include the Commission’s complaint contact information on bills, however, could give consumers the impression that they should contact the Commission to address all billing inquiries instead of first contacting their wireless service provider. This would likely result in a significant increase of calls and messages to the Commission (which may not be equipped to handle the volume) that otherwise would have been addressed routinely and expeditiously by carriers to customers’ satisfaction. It also could delay the resolution of an issue for weeks or months while the Commission reviews the matter and contacts the customer’s wireless service provider. Consumers thus would be subjected to several time-consuming steps that would ultimately bring them back to the carrier anyway. This scenario would be exponentially worse if the Commission required providers to include contact information for all third-parties placing charges on that bill.

In addition, new cramming regulations would impose significant costs and implementation challenges on wireless service providers. Depending on the particular requirement, wireless carriers likely would incur substantial sums to modify their billing systems, provide additional training to customer service representatives, develop new billing policies and procedures, review (and potentially replace) all third-party billing agreements, and take other implementation steps. These additional costs ultimately would be borne by *all* wireless consumers. Yet new cramming rules arguably would benefit – if anyone – only the

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<sup>39</sup> See Presidential Memorandum: Regulation and Independent Regulatory Agencies (July 11, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/07/11/memorandum-regulation-and-independent-regulatory-agencies>.

0.00016 percent of wireless customers that have raised complaints on the matter. New cramming requirements thus could increase the cost of wireless services without providing any tangible benefit to the vast majority of consumers.

Rather than adopt new rules that will inevitably reduce the flexibility of wireless carriers to address billing issues, the Commission should continue to support voluntary industry practices directed toward any cramming concerns (including cramming by third parties). It should also work with carriers to help consumers become better aware of the myriad tools available to monitor and manage their accounts. For example, the Commission should help publicize information from carriers and third parties on how consumers can avoid unauthorized charges on their bills, including by supplementing the Consumer & Governmental Affairs Bureau website with links to carrier websites or other third-party sources. It also could include links to the wireless consumer checklists discussed above that have been distributed by carriers.

Unlike the proposed regulatory mandates, an educational initiative such as this would help consumers continue to avoid unauthorized mobile charges without stifling the development of innovative, new account management tools or increasing the cost of wireless service. In the end, these collaborative efforts would be far more effective at reducing instances of cramming than adopting indirect rules related to bill formats and font sizes.

## **VI. THE COMMISSION LACKS AUTHORITY TO ADOPT THE PROPOSALS INCLUDED IN THE *NPRM*.**

The Commission seeks comment in the *NPRM* on its legal authority to adopt the proposed rules and other cramming requirements.<sup>40</sup> The Commission does not have authority under the Communications Act to adopt new cramming or truth-in-billing-type rules related to

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<sup>40</sup> *Id.* ¶ 82.

SMS<sup>41</sup> and wireless broadband data services, or to adopt rules regarding the billing for such services. SMS and wireless broadband data services are non-common carrier services that constitute information services. Additionally, the Commission already has determined that billing and collection services provided by carriers for third parties are not subject to Title II regulation. Moreover, such requirements – whether applicable to voice or SMS and data services – would violate the First Amendment because they are unduly burdensome and are not justified by the record in this proceeding. For these reasons, the Commission should not adopt its proposed usage alert and information disclosure requirements.

**A. Title III of the Communications Act Does Not Authorize the Commission to Impose Cramming Rules on Wireless Data and SMS Subscribers.**

The Commission does not have authority under Title III to require wireless carriers to comply with cramming requirements for data and SMS subscribers. Specifically, Section 332(c) prohibits the Commission from imposing such requirements on non-common carrier services. And even if there was no such prohibition, the other provisions of Title III do not grant the Commission authority to impose cramming rules.

**1. Section 332(c) Prohibits the Commission From Imposing Common Carrier Cramming Obligations Related to Carriers’ Own Wireless Broadband Internet Access Services and SMS.**

The Commission’s proposed cramming requirements related to carriers’ billing for their own services would constitute Title II common carrier obligations.<sup>42</sup> Like the Commission’s truth-in-billing rules, the proposed mandates would be designed to assist consumers in

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<sup>41</sup> For SMS services, messages are routed through what is known as a short message service center (“SMSC”), which houses computers that store, process, and transform SMS messages. Among other things, the SMSC stores the SMS message until the recipient’s device is ready to receive it, after which the SMSC retrieves and forwards the message.

<sup>42</sup> *NPRM* ¶ 83.

understanding their bills and preventing unauthorized charges.<sup>43</sup> When it adopted the common carrier truth-in-billing requirements, the Commission noted that it has “jurisdiction under Title II to regulate the manner in which a carrier bills and collects for its services . . . .”<sup>44</sup> It also stated that the truth-in-billing rules would “deter carriers from engaging in unjust and unreasonable practices in violation of section 201(b).”<sup>45</sup> The Commission’s authority, however, to subject wireless carriers to cramming or truth-in-billing requirements related to SMS and wireless broadband data services is distinguishable.

Section 332(c) limits the Commission’s ability to impose these types of common carrier requirements. It states that for mobile services, common carrier obligations may be imposed only on services that constitute a “commercial mobile service” (*i.e.*, CMRS), defined as “any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) such classes of eligible users as to be effectively available to a substantial portion of the public.”<sup>46</sup> Nothing in other portions of the Act overrides this express prohibition. Although voice services are considered CMRS, and therefore subject to common carrier obligations, carrier-provided wireless broadband data services and SMS are not. Moreover, the applications and premium content that carriers may chose to bill on behalf of the parties providing those services are not provided by carriers. Therefore, the Commission is prohibited from promulgating cramming rules that would apply to those services.

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<sup>43</sup> See, e.g., *NPRM* ¶ 1; *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492 ¶ 20 (1999).

<sup>44</sup> See *id.* ¶ 25; see also ¶ 21 (citing as authority Sections 201(b) and 258(a)).

<sup>45</sup> See *id.* ¶ 24; see also *id.* ¶ 25 (stating that “[b]illing, like all other practices for and in connection with interstate service, must be just and reasonable”); 47 C.F.R. § 64.2401.

<sup>46</sup> 47 U.S.C. § 332(d)(1).

The Commission previously has held that wireless broadband Internet access service is not CMRS.<sup>47</sup> Specifically, it found that the service is not an “interconnected service” within the meaning of Section 332 and the Commission’s CMRS rules because it does not “give subscribers the capability to communicate to or receive communications from all other users on the public switched network.”<sup>48</sup> Thus, pursuant to the express terms of Section 332(c), the Commission’s cramming proposals cannot be extended to wireless broadband Internet access services. The Commission also found that wireless broadband Internet access service is an “information service” under the Act and, therefore, not subject to Title II common carrier requirements.<sup>49</sup>

SMS services also are not CMRS.<sup>50</sup> Like wireless broadband Internet access services, SMS services are not “interconnected services” under Section 332 and the Commission’s CMRS rules. Notably, they do not “give subscribers the capability to communicate to or receive communications from all other users on the public switched network.”<sup>51</sup> SMS messages are not transmitted on the public switched telephone network (“PSTN”) (unlike CMRS voice services). Moreover, they are transmitted primarily between mobile phones and do not offer subscribers the capability of communicating with all other PSTN users. Thus, Section 332(c) also precludes the Commission from extending new cramming rules to SMS services.

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<sup>47</sup> See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 ¶ 45 (2007) (“*Wireless Broadband Declaratory Ruling*”).

<sup>48</sup> See *id.* The term “interconnected service” is defined as “a service that is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network . . . .” 47 C.F.R. § 20.3.

<sup>49</sup> *Wireless Broadband Declaratory Ruling* ¶¶ 22, 41.

<sup>50</sup> See, e.g., Comments of CTIA – The Wireless Association®, WC Docket No. 08-7, 40-44 (filed Mar. 14, 2008).

<sup>51</sup> 47 C.F.R. § 20.3.

**2. Separate From the Prohibition in Section 332(c), the Commission Lacks Authority Under Title III to Impose its Cramming Proposals on Data or SMS Services.**

As discussed above, Section 332(c) expressly prohibits the Commission from promulgating new cramming requirements for wireless broadband and SMS services. Even if there was no express prohibition, however, the Commission would lack authority under Title III to impose those requirements on wireless broadband data services and SMS services.

For example, Section 301 grants the Commission subject matter authority to regulate “radio communications” and the “transmission of energy by radio.”<sup>52</sup> As the D.C. Circuit held in *Comcast*, however, such grants of subject matter authority do not confer authority to adopt any specific regulations.<sup>53</sup> Section 303(r) similarly does not contain an independent grant of regulatory authority; it only authorizes rules where the Commission has separate authority and where such rules are “not inconsistent with the law.”<sup>54</sup>

Sections 307(a) and 316 are also inapplicable. Section 307(a) authorizes the issuance of licenses “if public convenience, interest, or necessity will be served thereby”<sup>55</sup> and has effect only before a license is granted. In this proceeding, the Commission proposes to extend new cramming mandates to existing wireless licensees and service providers. And Section 316 provides authority to modify licenses, but it is concerned with individual licenses and licensee action, not broad rulemaking proceedings.<sup>56</sup> For that reason, it includes certain individualized licensee protections such as written notification, a reasonable opportunity to protest, and

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<sup>52</sup> 47 U.S.C. § 301.

<sup>53</sup> *Comcast Corp. v. FCC*, 600 F.3d 642, 647-49 (D.C. Cir. 2010).

<sup>54</sup> 47 U.S.C. § 303(r).

<sup>55</sup> *Id.* § 307(a).

<sup>56</sup> *See, e.g., WBen, Inc. v. United States*, 396 F.2d 601, 618-19 (2d. Cir. 1968).

potentially a hearing.<sup>57</sup> Both Section 307(a) and Section 316 are also too vague to be reasonably interpreted as providing authority for the Commission’s specific cramming proposals.

Although Section 303(b) authorizes the Commission, subject to what the “public interest, convenience, or necessity requires,” to “[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class,”<sup>58</sup> this authority does not extend so far as to support the Commission’s cramming requirements. Instead, Sections 303(a), (b), and (c) grant authority for the Commission to identify spectrum to be allocated, designate the nature of services for those allocations, and assign the spectrum to classes of radio stations.<sup>59</sup> Here, the Commission is not deciding allocation or assignment issues, or defining which services should be offered in a particular spectrum band; instead, it is determining (at most) how licensees offer their services and imposing new conditions on existing licensees. Thus, Section 303(b) is inapplicable to the Commission’s proposed rules.

Although the Commission recently relied on Title III authority to impose roaming requirements applicable to mobile data services, the decision is currently subject to a pending court appeal.<sup>60</sup> And whereas the Commission expressly found that roaming requirements are within its spectrum management authority,<sup>61</sup> the proposed cramming rules and other billing proposals have no substantive connection to spectrum management or usage.

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<sup>57</sup> 47 U.S.C. § 316.

<sup>58</sup> *Id.* § 303(b).

<sup>59</sup> See, e.g., *Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, First Report and Order and Second Notice of Proposed Rulemaking, 10 FCC Rcd 4769, 4791 (1995).

<sup>60</sup> See, e.g., *Cellco Partnership d/b/a Verizon Wireless v. FCC*, Case No. 11-1135 (D.C. Cir. filed May 13, 2011).

<sup>61</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 10021 ¶ (2011).

**B. The Commission Also Lacks Authority Under Titles I and II to Adopt Cramming Rules for Data and SMS Services and for Billing Services Provided to Third Parties.**

Like Title III, Titles I and II do not provide sufficient authority for the Commission to adopt common carrier cramming requirements for wireless broadband data services and SMS services or for billing services provided to third parties.

Section 153(44) of the Act provides that a telecommunications carrier shall be treated as a common carrier and therefore regulated under Title II “only to the extent that it is engaged in providing telecommunications services.”<sup>62</sup> As noted above, the Commission already has determined that wireless broadband Internet access services are information services regulated under Title I, not telecommunications services regulated under Title II. And as CTIA has previously explained to the Commission, SMS services are also information services subject to Title I of the Act.<sup>63</sup> For example, SMS services contain all of the key characteristics of other services like email and voice storage and retrieval that have been classified as information services. They involve the storage and forwarding of message, data conversion, and data retrieval functions. Just as with email, SMS messages are not sent directly to the recipient, but rather to computers that store the data until it is ready to be received. SMS also offers the capability for “subscriber interaction with stored information,” consistent with other information services.<sup>64</sup> In addition, computers regularly act on the form and content of an SMS message, and

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<sup>62</sup> 47 U.S.C. § 153(44).

<sup>63</sup> See, e.g., Comments of CTIA – The Wireless Association®, WC Docket No. 08-7, 32-40 (filed Mar. 14, 2008). “Information service” is defined as a service that provides the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20).

<sup>64</sup> *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Final Decision, 77 FCC 2d 384 ¶ 97 (1980) (prior and subsequent history omitted); *United States v. W. Elec. Co.*, 1998 U.S. Dist. LEXIS 13536 (D.D.C. 1998) (finding time and weather information announcements to be information services) (subsequent history omitted).

SMS messages routinely involve “address translation, protocol conversion [and] billing management.”<sup>65</sup> Because wireless broadband Internet access services and SMS services are information services regulated under Title I, the Commission cannot subject them to the proposed Title II common carrier cramming requirements.

In addition, the Commission already has determined that the billing and collection service provided by carriers to third parties is not subject to regulation under Title II.<sup>66</sup> The Commission stated that “carrier billing or collection for the offering of another unaffiliated carrier is not a communication service for purposes of Title II of the Communications Act,” adding that it “does not employ wire or radio facilities and does not allow customers of the service . . . to ‘communicate or transmit intelligence of their own design and choosing.’”<sup>67</sup> Instead, billing and collection “is a financial and administrative service.”<sup>68</sup> It encompasses “the recording and aggregation of the billing data . . . , the application of the [third party’s rates] to create a customer invoice, the mailing of bills, the collection of customer deposits and bill payments, the handling of customer inquiries concerning their bill, and the investigation of customer fraud or billing evasion activities.”<sup>69</sup> The Commission also stated that even if billing and collection for another carrier is assumed to be a “communication service” (now called telecommunications service

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<sup>65</sup> See *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 ¶ 75 (1998).

<sup>66</sup> See *Detariffing of Billing and Collection Services*, Report and Order, 102 FCC 2d 1150 ¶¶ 30-34 (1986) (“1986 Detariffing Order”). The Commission reaffirmed this decision in 2007 when it declined to impose safeguards addressing the billing and collection practices of Bell Operating Companies. *Section 272(F)(1) Sunset of the BOC Separate Affiliate And Related Requirements*, 22 FCC Rcd 16440 ¶ 113 (2007).

<sup>67</sup> *Id.* ¶ 32.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

under the Communications Act), it is “doubtful” that such activities for third parties could be described as a “common carrier” service. The *NPRM* fails to mention this prior decision.<sup>70</sup>

The Commission also cannot use its ancillary jurisdiction under Title I to enact new cramming mandates. As the D.C. Circuit recognized in *Comcast*, an assertion of ancillary jurisdiction must further a statutorily mandated responsibility or specific Commission power found elsewhere in the Act.<sup>71</sup> As demonstrated above, no such direct statutory responsibility exists. Moreover, the Commission cannot rely on ancillary jurisdiction to impose common carrier regulations on services that are expressly exempt from such regulation.<sup>72</sup> Here, wireless broadband Internet access services and SMS, as non-CMRS information services, are expressly exempt from common carrier regulation under both Section 332(c) and Section 153(44), as discussed above. With respect to billing and collection for third-party services, the Commission previously found that exercising ancillary jurisdiction was not justified because “there is sufficient competition to allow market forces to respond to excessive rates or unreasonable billing and collection practices” and that significant competition “will continue to develop.”<sup>73</sup>

### **C. The Commission’s Cramming Proposals Likely Violate Carriers’ First Amendment Protections.**

The Commission’s proposed cramming rules and other proposals also likely would violate carriers’ First Amendment rights. The First Amendment protects against government compelled speech as well as outright prohibitions on speech; as the Supreme Court stated,

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<sup>70</sup> *Id.* ¶ 33.

<sup>71</sup> *See Comcast*, 600 F.3d at 646.

<sup>72</sup> *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-01 (1979); *see also NARUC v. FCC*, 533 F.2d 601, 607 (D.C. Cir. 1976) (stating that courts must review “whether any statutory commandments are directly contravened” by the asserted ancillary jurisdiction) (internal citations omitted). In *Midwest Video*, the Supreme Court struck down a Commission Order imposing common carrier regulations on cable providers because of a provision in Section 3(h) of the Act that prohibits broadcasters from being deemed common carriers.

<sup>73</sup> *1986 Detariffing Order* ¶¶ 36-37.

“freedom of speech prohibits the government from telling people what they must say.”<sup>74</sup> In the commercial speech context, the Supreme Court has held that the government may compel the disclosure of “purely factual and uncontroversial information” consistent with the First Amendment only if the disclosure requirements “are reasonably related to the State’s interest in preventing deception of consumers,” and are not “unjustified or unduly burdensome.”<sup>75</sup>

As an initial matter, the proposed requirement to include Commission complaint contact information on wireless bills and carrier websites would do nothing to *prevent* cramming from occurring. Moreover, the various cramming proposals in the *NPRM* would create an unjustified and undue burden on wireless carriers because of the significant implementation challenges and costs described above, including costs associated with addressing consumer confusion and frustration created by the new requirements.<sup>76</sup>

In addition to being unduly burdensome, the cramming proposals are also unjustified because the record fails to show that the required disclosures are directed at a harm caused by carriers’ misleading statements or actions.<sup>77</sup> As discussed above, consumers are satisfied with their wireless service, and carriers are vigorously competing to enhance their customer service

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<sup>74</sup> *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006).

<sup>75</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *see also Milavetz v. United States*, 130 S. Ct. 1324, 1339-40 (2010).

<sup>76</sup> Some of the proposals discussed in the *NPRM* would also go far beyond adding a mandated disclosure to a message already in distribution, a form of compelled speech that typically does not offend the First Amendment. *See Zauderer*, 471 U.S. at 651 (upholding a required disclosure to be added to advertisements); *Connecticut Bar Ass’n v. United States*, 620 F.3d 81, 101 (2nd Cir. 2010) (finding no heavy burden when plaintiffs are required to include an additional message in their communications); *United States v. Wenger*, 427 F.3d 840, 851 (10th Cir. 2005) (holding that a disclaimer imposes little burden when it only requires a publicist to disclose, in the course of producing a half-hour broadcast or multi-page newsletter, the amount of consideration he received).

<sup>77</sup> *See Ibanez v. Florida Dep’t of Bus & Prof’l Regulation*, 512 U.S. 136, 147 (1994) (stating that the state failed to “back up” its claim that the harm the required disclosures were meant to address was created by the speech at issue); *Tillman*, 1996 WL 767477, \*4 (“a state must demonstrate that the harms to the public which are addressed by the compelled speech are fostered intentionally or inadvertently, by the underlying speech”) *aff’d*, 133 F.3d 1402 (11th Cir. 1998).

offerings, prevent cramming from occurring, and address cramming issues when they do occur. Whereas courts may find that the First Amendment permits the government to compel speech as a remedy to fix a misleading or incomplete message,<sup>78</sup> carriers already make available to consumers all of the information they need to prevent cramming and monitor their wireless bills. Thus, by imposing both an undue and unjustified burden on wireless providers, the Commission's cramming proposals would impermissibly infringe their First Amendment rights.

## **VII. CONCLUSION**

For the foregoing reasons, the Commission should refrain from imposing unnecessary, burdensome, and unlawful cramming mandates on wireless services. Instead, it should support voluntary industry efforts to prevent cramming and work with providers to educate consumers about the variety of account management tools already available. It also should take

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<sup>78</sup> See *Zauderer*, 471 U.S. at 651 (“The State has attempted only to . . . require[] that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available.”); *United States v. Schiff*, 379 F.3d 621, 630 (9th Cir. 2004) (holding that website operator may be compelled to post factual information about potential criminal liability if patrons utilized the illegal tax schemes posted on his website).

enforcement action to address the astounding number of TCPA complaints filed by wireless consumers.

Respectfully submitted,

By:     /s/   *Brian M. Josef*

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October 24, 2011

# **ATTACHMENT A**

Cramming & TCPA-Related Extract from FCC CGB Quarterly Reports on Informal Consumer Inquiries and Complaints

	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
Wireless Complaint Numbers	14,147	21,357	29,478	25,941	17,415	31,879	61,938	66,831	72,334
Cramming	92	0	0	0	0	0	0	0	0
Wireless TCPA	0	0	0	0	1,707	14,614	42,154	47,842	52,481
Wireline Complaint Numbers	35,214	55,436	60,977	74,712	65,027	85,147	140,780	131,778	100,472
Cramming	3,128	2,450	519	1,761	685	0	1,149	0	0
TCPA-Unsolicited Fax	0	0	0	0	32,402	41,816	56,043	28,468	20,615
TCPA-Do Not Call List	0	0	0	0	0	10,754	25,622	40,597	30,460
TCPA-Other Issues	0	0	0	0	20,177	20,639	39,147	44,411	34,558
Total Wireline TCPA Complaints	7,489	25,674	37,703	54,932	52,579	73,209	120,812	113,476	85,633
Total Wireless & Wireline TCPA Complaints	7,489	25,674	37,703	54,932	54,286	87,823	162,966	161,318	138,114
Total Cramming Complaints per NPRM							2,157	3,181	2,516

Cramming & TCPA-Related Extract from FCC CGB Quarterly Reports on Informal Consumer Inquiries and Complaints

	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
Wireless Complaint Numbers									
Cramming	1%	0%	0%	0%	0%	0%	0%	0%	0%
Wireless TCPA	0%	0%	0%	0%	10%	46%	68%	72%	73%
Wireline Complaint Numbers									
Cramming	9%	4%	1%	2%	1%	0%	1%	0%	0%
TCPA-Unsolicited Fax	0%	0%	0%	0%	50%	49%	40%	22%	21%
TCPA-Do Not Call List	0%	0%	0%	0%	0%	13%	18%	31%	30%
TCPA-Other Issues	0%	0%	0%	0%	31%	24%	28%	34%	34%
Total Wireline TCPA	21%	46%	62%	74%	81%	95%	86%	86%	85%
Total Wireless & Wireline Complaints Reported	49,361	76,795	90,455	100,654	82,442	117,026	202,718	198,609	172,806
Total Wireless & Wireline TCPA as a % of Reported Complaints	15%	33%	42%	55%	66%	82%	80%	81%	80%